No. 7323

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BERNHARD DAVIDOW,

Appellant,

vs.

LACHMAN BROS. INVESTMENT CO. (a corporation), G. P. ANDERSON, TITLE INSURANCE & GUARANTY CO. (a corporation), CORPORATION OF AMERICA (a corporation), BANK OF AMERICA OF CALIFORNIA (a corporation), BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION (a corporation),

Appellees.

BRIEF FOR APPELLEES, LACHMAN BROS. INVESTMENT CO. (A CORPORATION), G. P. ANDERSON, AND TITLE INSURANCE & GUARANTY CO. (A CORPORATION),

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Honorable Frank H, Kerrigan, Judge.

JOSEPH E. BIEN,
WERNER OLDS,
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Attorneys for said Appellees.

BERNAU WALSH PRINTING CO., SAN FRANCISCO

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BILL OF COMPLAINT.

Referring only to the portions of the bill which are relevant to this appeal, the facts shown, and *deemed admitted,* are as follows:

On June 16, 1930, appellant borrowed from appellee Bank of America $150,000; as security therefor he executed a deed of trust to appellee Corporation of America, trustee of the real properties in the County of Napa and in the City and County of San Francisco. (Tr. pp. 8, 9.)

On July 15, 1930, appellant borrowed from appellee G. P. Anderson $25,000 and as security therefor he executed a second deed of trust of the same properties to appellee Title Insurance & Guaranty Co., trustee. (Tr. p. 9.)

Appellant defaulted in the payment of money due G. P. Anderson, secured by the second deed of trust, and on February 20, 1931, appellee G. P. Anderson, acting under Section 2924 of the California Civil Code, sold the properties. (T. p. 14.)

It is conceded by appellant that "the proceedings were conducted in accordance with California Civil Code, Sec. 2924." (Brief for Appellant, p. 3. Tr. pp. 14, 15.)

The properties were sold to appellee G. P. Anderson; that in San Francisco for $15,000 and that in Napa County for $5,000, all subject to the first deed of Trust securing $150,000. (Tr. p. 12.) Appellee Title Insurance & Guaranty Co. Trustee executed its deed to G. P. Anderson (Tr. pp. 15, 16), and G. P. Anderson thereafter conveyed to Lachman Bros. Investment Co. (Tr. pp. 16, 17.)

On July 15, 1932, and after the deed from appellee G. P. Anderson to appellee Lachman Bros. Investment Co., appellee Lachman Bros. Investment Co.

paid to appellee Bank of America on the $150,000 deed trust the sum of $25,000, and received a conveyance (Exhibit "D") releasing to the "person or persons entitled thereto" (Lachman Bros. Investment Co.) the Napa County Property. (Tr. pp. 24, 43.)

APPELLANT'S CONTENTIONS.

I.

Appellant claims that, under California law, a trustor can create but *one* valid deed of trust on real property to secure the payment of money or other obligation. That when the trustor has made one deed of trust he has parted with the legal title, and therefore cannot make a second deed of trust on the same property: that therefor appellee Title Insurance & Guaranty Co. as trustee, obtained no title from appellant: that appellee G. P. Anderson as bidder at the sale made by appellee Title Insurance & Guaranty Co. trustee obtained no title: that appellee Lachman Bros. Investment Co. obtained no title by the conveyance from appellee G. P. Anderson: that since appellee Lachman Bros. Investment Co. never had title to the property, it could not deal with appellee Bank of America or appellee Corporation of America and obtain a release of the Napa County property by the payment of $25,000: that because Lachman Bros. Investment Co. did deal with appellees Bank of America and Corporation of America, obtaining a release of the Napa County property, appellant is entitled to all the properties free and clear of both deeds of

trust: that appellee Bank of America should forfeit its $125,000: that appellee Lachman Bros. Investment Co. should forfeit $25,000 it paid to Bank of America and also $25,000 it loaned to appellant under the second deed of trust.

II.

Appellant claims that he has been deprived of the properties without due process of law, in violation of the 14th Amendment of the Constitution of the United States, although the "proceedings were conducted in accordance with California Civil Code Sec. 2924" and although the "provisions and regulations of said Sec. 2924" were "followed literally." (Brief for Appellant p. 3.)

THE ALLEGATIONS OF THE BILL RELEVANT TO THIS APPEAL.

"XIII.

That at the time of the execution of said instrument by the plaintiff, Bernhard Davidow, to the defendant Title Insurance and Guaranty Co., trustee, 'Exhibit B' hereto attached, the said plaintiff had no legal title to said premises, except to the right of possession and the right to the issues thereof having theretofore conveyed the same under said deed of trust marked 'Exhibit A' attached to this complaint, and for said reason the said defendant Title Insurance and Guaranty Co., trustee, acquired no right, title, estate or interest *in presenti* of any kind or nature, either legal or equitable, in or to the said premises

therein described and for said reason all proceedings had and done subsequent to, under, and/or in reliance on the purported Deed of Trust, 'Exhibit B,' hereinbefore referred to, conveyed and transferred to neither said defendant Title Insurance and Guaranty Co., trustee, nor to said defendant G. P. Anderson, any interest of any nature in or to said properties or any part or portion thereof, but that all proceedings had and done under and in accordance with any of the terms or provisions contained in said instrument 'Exhibit B' hereto attached, were and are utterly void and without any legal effect of any kind, and for the same reason and upon the same grounds, the defendant Lachman Bro's. Investment Co. acquired no right, title, state or interest of any kind or nature in and/or to said lands and premises from the defendant G. P. Anderson by the instrument hereinabove set forth as 'Exhibit C.'

That by reason of the aforesaid attempted foreclosure proceedings under said Section 2924 of the California Civil Code, as aforesaid, the said Notices of Sale were insufficient and that by reason thereof plaintiff's said property was sought to be taken and has been taken without due process of law which said proceeding was and is in direct conflict with the express terms of Section 1, of Amendatory Article XIV of the Federal Constitution.

XIV.

Plaintiff further alleges and shows that said Section 2924 of the Civil Code of California, both in its present condition and prior to its amendment in 1931, was and is unconstitutional, illegal and void; that said Statute is not in truth and/or

in fact law, and therefore, cannot be made the basis or authority for any of the acts and/or doings and/or claims of the defendants, or any of them, in the premises; that said pretended law is unconstitutional and void, because:—

(a) Its enactment was beyond the powers vested in the Legislature of the State of California in that it contemplates and provides a method of procedure by which legal rights may be asserted, and legal obligations enforced by the taking of title to property, from the owner thereof, without any notice and fair opportunity to be heard in his defense in a judicial action or at all and thereby deprives the owner of property of rights therein and thereto without due process of law and in that it thereby violates the inhibition of that portion of the Fourteenth Amendment to the Constitution of the United States hereinabove quoted:

(b) The aforesaid acts of defendants under said Section 2924 of the Civil Code of the State of California, if permitted, suffered and/or condoned, would deprive plaintiff of his property and rights in and to the same without due process of law, in violation of the provision in the Constitution of the State of California guaranteeing and securing to all persons within its jurisdiction that no person shall be deprived of the title to property without due process of law and in that it thereby violates the said constitutional provision and denies to him the equal protection of the laws in violation of the provisions of a portion of the Fourteenth Amendment to the Constitution of the United States.

(c) The foreclosure of said instrument 'Exhibit B' under said Civil Code Section 2924, if

permitted, suffered and/or condoned, would subject plaintiff to the deprivation of his property without due process of law and deny to him equal rights and benefits under the laws and thereby abridge the right, privileges and immunities belonging to plaintiff as a citizen of the United States that he shall not, under color of any law, statute, ordinance, regulation or custom, be deprived of the title or right to possession of property without personal notice and without being afforded a fair opportunity to be heard in its and his defense, and, therefore, it violates the inhibition of the provisions of the portion of the Fourteenth Amendment to the Constitution of the United States above quoted."

(Tr. pp. 17, 18, 19.)

This allegation above is particularly called to this Court's attention:

"(b) The aforesaid acts of defendants under said Section 2924 of the Civil Code of the State of California, if permitted, suffered and/or condoned, would deprive plaintiff of his property and rights in and to the same without due process of law, in violation of the provisions in the Constitution of the State of California guaranteeing and securing to all persons within its jurisdiction that no person shall be deprived of the title to property without due process of law."

California Civil Code, Section 2924:

"* * * in any transfer in trust * * * to secure the performance of an obligation a power of sale is conferred upon the mortgagee, trustee or any

other person, to be executed after breach of the obligation for which said mortgage or transfer is a security, such power shall not be exercised * * * until (a) the trustee, mortgagee or beneficiary shall first file for record in the office of the recorder of each county wherein the mortgaged or trust property, or some part or parcel thereof, is situated, a notice of default identifying the mortgage or deed of trust by stating the name or names of the trustor or trustors and giving the book and page where the same is recorded, or a description of the mortgaged or trust property, and containing a statement that a breach of the obligation for which said mortgage or transfer in trust is security has occurred, and of his election to sell or cause to be sold such property to satisfy the obligation; (b) not less than three months shall thereafter elapse; and (c) the mortgagee, trustee or other person authorized to make the sale shall give notice of the time and place thereof in the manner and for a time not less than that required by law for sales of real property upon execution."

Constitution of California, Section XIII:

"No person shall be * * * deprived of life, liberty or property without due process of law."

Constitution of the United States, Amend. XIV, Sec. 1:

"* * * nor shall any state deprive any person of life, liberty or property without due process of law * * *."

I.

ARGUMENT.

THE OWNER OF REAL PROPERTY MAY INCUMBER IT WITH A DEED OF TRUST FOR SECURITY AND THEREAFTER CONVEY THE PROPERTY AND/OR INCUMBER IT WITH FURTHER DEEDS OF TRUST.

A deed of trust for security is substantially but a mortgage with a power of sale.

Sacramento Bank v. Alcorn, 121 Cal. 379.

Notwithstanding a conveyance by deed of trust for security the trustor may thereafter transfer or further incumber the property and his grantee acquires a legal estate against all persons except the trustee and persons claiming under him.

Sacramento Bank v. Alcorn, supra.

> "The grantee or devisee of real property, subject to a trust, acquires a legal estate in the property as against all persons except the trustees and those lawfully claiming under them."
>
> *California Civil Code,* Section 865.

> "When the purpose for which an express trust was created ceases, the estate of the trustee also ceases."
>
> *California Civil Code,* Section 871.

> "Under decisions and statutes it would seem that, while we must say that the title passes, none of the incidents of ownership attach, except that the trustees are deemed to have such estate as will enable them to convey. So limited, such a trust has all the characteristics of a *power in trust.* * * *
>
> "Our own records will disclose the fact that trust deeds have been frequently used as security

for loans. Their validity has been upheld in numerous cases beginning very soon after the adoption of the code and continuing until the present time. (Quoting cases.) These decisions, which have been uniform, establish a conclusion which has become a rule of property, and however thoroughly we might now be convinced that the rule is erroneous it should not be disturbed. Doubtless many people have invested their money, relying upon this construction of the law by the highest tribunal of the state, while those who have executed such deeds have done so with the expectation that they would be held valid. Ruin and injustice would result from such a decision as is now sought. If the question as to whether the rule of stare decisis shall prevail be one of policy, there is here no balancing of the evil done against a good attained. The result would be evil only."

Sacramento Bank v. Alcorn, supra.

"The passing of the legal title in such case (a deed of trust) is mostly ideal. It is deemed to have passed only for the purpose of enabling the trustee to convey a title. In all other respects the title remains in the trustor."

Herbert Craft Co. v. Bryan, 140 Cal. 73, 68 Pac. 1020.

"While the deed of trust in one sense passed the title, yet it did so only for the purpose of security, and so, except as to the form and the procedure by which the loan could be enforced, was substantially a mortgage."

Tyler v. Currier, 147 Cal. 31 (81 Pac. 319).

"These decisions are based upon the fact that such a deed, though in form a grant, is really

only a mortgage, and does not convey the fee. A trust-deed of the kind here involved differs from such a deed only in that it conveys the legal title to the trustees so far as may be necessary to the execution of the trust. It carries none of the incidents of ownership of the property, other than the right to convey upon default on the part of the debtor in the payment of his debt. The nature of such an instrument has been extensively discussed by this court, and the sum and substance of such discussion is that while the legal title passes thereunder, and the trustees cannot be held to hold a mere 'lien' on the property, it is *practically and substantially only a mortgage with power of sale.* (See Sacramento Bank vs. Alcorn, 121 Cal. 379, 383 (53 Pac. 813); Tyler vs. Currier, 147 Cal. 31, 36, (81 Pac. 319); Weber vs. McCleverty, 149 Cal. 316, 312, (96 Pac. 706). The legal title is conveyed solely for the purpose of security, leaving in the trustor or his successors a legal estate in the property, as against all persons except the trustees and those lawfully claiming under them. (Civ. Code, secs. 865, 866). *Except as to the trustees and those holding under them, the trustor or his successor is treated by our law as the holder of the legal title.* (King vs. Gotz, 70 Cal. 236, (11 Pac. 656). The legal estate thus left in the trustor or his successors entitled them to the *possession* of the property until their rights have been fully divested by a conveyance made by the trustees in the lawful execution of their trust, and entitled them to exercise all the ordinary incidents of ownership in regard to the property, subject, always, of course, to the execution of the trust. This estate is a sufficient basis for a valid claim of homestead."

McLeod v. Moran, 153 Cal. 97 (94 Pac. 604).

A deed of trust for security transfers to the trustee only such title as will enable the trustee, in case of default, to convey. No incident of ownership reaches the trustee.

Sacramento Bank v. Alcorn, supra.

The grantor is still the beneficial owner and can maintain any necessary action dealing with the title and can convey such title subject to the deed of trust. That such is the effect of such an instrument (a deed of trust) is well settled by the decisions of the State of California:

King v. Gotz, 70 Cal. 236 (11 Pac. 956);
Kennedy v. Noonan, 52 Cal. 326;
Brown v. Campbell, 100 Cal. 635 (35 Pac. 433).

The whole subject is ably reviewed and the California decisions fully cited in the opinion of Gilbert, J., in the case of

U. S. Oil & Land Co. v. Bell et al. (Circuit Court of Appeals, Ninth Circuit) 219 Fed. 785.

See also

So. Pac. Co. v. Doyle, 11 Fed. 253.

See also decisions by the State of California:

Warren v. All Persons, 153 Cal. 775;
Sheldon v. Le Brea Co., 216 Cal. App. 686;
Miller v. Bank, 71 C. A. D. 1175;
Duncan v. Wolfer, 60 Cal. App. 120;
Wyser v. Truitt, 95 Cal. App. 727;
Wasco etc. Co. v. Coffee, 117 Cal. App. 298.

"At early common law the usual method of hypothecating real property as security for a debt

was by means of a deed absolute with an oral agreement of defeasance when and if the debt was paid. Under this doctrine 'title' passed to the mortgagee. If the debtor did not pay the obligation when due, a forfeiture took place. The equity courts, however, at an early date worked out the theory of equity of redemption, which permitted the mortgagor to redeem at any time after default and before foreclosure, and which required the mortgagee to foreclose to cut off this right to redeem. Under this doctrine, it is obvious that the 'title' of the mortgagee before foreclosure is a limited one. The common-law courts held, however, that 'title' to the property was in the mortgagee and this 'title' theory of mortgages still prevails in many states. (1 Jones, Mortgages, 8th ed., chaps. 1, 2, 3.) Early in the history of this state, however, our courts and the legislature, in an attempt to express the real essence of the transaction, adopted the so-called 'lien' theory of mortgages, under which the mortgagee does not get title, but simply obtains a lien. (Civ. Code, secs. 2920, 2927; Dutton vs. Warschauer, 21 Cal. 609 (82 Am. Dec. 765); McMillan vs. Richards, 9 Cal. 365 (70 Am. Dec. 655.).)"

Bank of Italy etc. v. Bentley, 217 Cal. 644 (p. 654).

II.

JURISDICTION.

No diversity of citizenship is involved in this suit and the sole ground of jurisdiction must be that a Federal question is involved.

No Federal question is involved. The allegations of the bill show that the *State of California* is not charged with depriving appellant of his property without due process of law and shows that appellant has not pursued any remedy in the State courts before resorting to the Federal Court. The District Court therefore had no jurisdiction.

Castillo v. McConnico, 168 U. S. 674, 42 Law ed. 622;

In re matter of the Commonwealth of Virginia, 100 U. S. 313, 29 Law ed. 667.

In the last cited case the Supreme Court held:

> "The prohibitions of the 14th Amendment have reference to state action exclusively and not to any action of private individuals. It is the state which is prohibited from denying to any person within its jurisdiction the equal protection of laws * * *."

In *Kiernan v. Multnomah County,* 95 Fed. 849, the Court held:

> "The fourteenth amendment has reference exclusively to *State* action, and not to any action by individuals. It is a prohibition upon the state to 'make or enforce any law which shall abridge the privileges or immunities of citizens of the United States,' or which shall 'deprive any person of life, liberty, or property without due process of law.' It prohibits state legislation in violation of these rights. It does not refer to any action by private individuals (Virginia v. Rives, 100 U. S. 318; U. S. v. Cruikshank, 92 U. S. 542; Civil Rights Cases, 109 U. S. 11, 3 Sup. Ct. 18), otherwise every invasion of the rights of one

person by another would be cognizable in the federal courts under this amendment. The questions sought to be presented in this case relate to the interpretation to be given a law of the state, and the complaint is that this law is being misinterpreted and misapplied, to the injury of the plaintiff in his rights of property. In all such cases, where there is not the requisite diverse citizenship and amount in controversy to give the court jurisdiction, the remedy for the injuries complained of is in the state courts." (Page 849.)

In *Palestine Telephone Co. v. City of Palestine,* 1 Fed. (2nd) 349, the Court say:

"It is well settled that the Fourth Amendment to the Constitution has reference to legislative enactments by the Congress of the United States (Barron v. Baltimore, 7 Pet. 243, 8 L. ed. 672), and that the Fourteenth Amendment applies only to expressions of the will of the state; that is, the act of the state must be the subject of the controversy. Not only the decisions, but the language of the amendment itself, make that clear. 'Nor shall any *state* deprive any person of life, liberty, or property, without due process of law.' Hamilton Gaslight Co. v. Hamilton, 146 U. S. 258, 13 Sup. Ct. 90, 36 L. Ed. 963; Louisville v. Cumberland Telephone Co., 155 Fed. 729, 84 C. C. A. 151, 12 Ann. Cas. 500; Seattle Electric Company v. Seattle Railway Co., 185 Fed. 369, 107 C. C. A. 421." (Page 349.)

Further, if the trustee under the second deed of trust violated the California law, or if the California law in reference to sales under deeds of trust violates the Constitution of the State of California the

United States District Court had no jurisdiction of the action. Appellant's forum for remedy is the Superior Court of the State of California, and if that Court improperly denies relief, an appeal to the Supreme Court of California, and from there, in the event of an affirmance, to the Supreme Court of the United States.

As stated in *Palestine Telephone Co v. City of Palestine,* supra:

> "The cases of Louisville v. Telephone Company, Memphis, v. Telephone Company, Barney v. City of New York, and other cases I have mentioned above, seem to me, in that state of affairs, to be directly in point. They establish the proposition that, if the ordinance was not within the authority delegated by the state in respect of such matters, this court has no jurisdiction to determine an issue respecting its constitutionality, even though, in fact, it is unconstitutional. The procedure in such a case is in the state courts, and through them to the Supreme Court of the United States. Seattle Electric Co. v. Seattle Railway Co., supra; 5 Enc. U. S. Sup. Repts. 543." (Page 350.)

The bill alleges that under the laws of the State of California a second deed of trust conveys no title "either legal or equitable" to the trustee. (Tr. p. 17.)

In the brief for appellant, page 38, it is stated: "We do not contend at this time that Civil Code Sec. 2924 is unconstitutional as enacted" but "that as construed by the trustee under the second deed of trust it is clearly unconstitutional."

In other words, appellant claims that the trustee under the second deed of trust improperly assumed powers not granted by Section 2924 of the Civil Code of California, and that, therefore, the Fourteenth Amendment of the United States Constitution has been violated by the State of California. Such an argument is clearly inconsistent. The Code section referred to is alleged to be valid, and yet by virtue of a valid statute the State, it is claimed, has violated the Fourteenth Amendment of the United States Constitution.

A case on all fours covering such contention is *City of Louisville v. Cumberland T. & T. Co.,* 155 Fed. 725.

In that case the bill alleged that no power was granted by the State Legislature permitting a municipality to fix telephone rates; that the municipality unlawfully assumed that power by enacting an ordinance fixing the rates, and "that the enactment of said ordinance was and is beyond the power of the common council of said city." Say the Court:

> "If this be true, there was no state authority behind the action of the Louisville common council and no ground to claim that constitutional prohibitions have been violated which are pointed at state aggression only. A municipal ordinance may be the exercise of a delegated legislative power conferred upon it as one of the political subdivisions of the state; but, to be given the force and effect of a law of the state, it must have been enacted in the exercise of some legislative power conferred by the state in the premises." (Page 729.)

If, as claimed by appellant, the state law is valid, and the trustee under the second deed of trust proceeded in violation of a valid law, no state action is involved and no federal question can be presented. If the action of the trustee under the second deed of trust was not within the powers conferred by Section 2924 of the Civil Code (and it is so claimed by appellant) then, as stated in *Palestine Tel. Co. v. City of Palestine,* 1 Fed. (2nd) 349, quoted supra.

> "The procedure in such a case is in the state courts, and thereafter to the Supreme Court of the United States." (Page 350.)

Further, Section 13 of Article 1 of the Constitution of California declares that no person shall "be deprived of life, liberty or property without due process of law."

It is claimed by appellant that he was deprived of his property without due process of law in violation of the Fourteenth Amendment of the Federal Constitution.

It has been consistently held that where a State Constitution contains a provision prohibiting the taking of a person's property without due process of law, the Federal Courts have no jurisdiction under the claim that the property of plaintiff has been taken without due process of law, for the reason that the State Constitution is the highest law of the State and that any law passed by the Legislature in violation of such State Constitution is no law and void, and any action taken under such void law is likewise void; that in such a case appellant's remedy is

in the State Courts, for it will not be presumed that the State Courts would deny its citizens the equal protection of the State Constitution. If, however, the State Courts should err, then appellant has his remedy by appeal to the Supreme Court of the United States. A case decided by the Circuit Court of Appeals of this Circuit, directly in point on the proposition just outlined, is,

Seattle Elec. Co. v. Seattle R. N. R. Ry. Co.,
185 Fed. 365.

The Court say, at pages 371 and 372:

"But there is a further, and as we believe a conclusive, objection to the claim of right on the part of the complainant to invoke the jurisdiction of the Circuit Court on constitutional grounds. It seems to us that in no aspect of the grant to the defendant is there a real and substantial dispute or controversy dependent upon the application of provisions of the Federal Constitution. If it should be conceded that in some view of the ordinance and defendant's action under color of its provisions there would be a taking of complainant's property without due process of law, still it would not follow that the Circuit Court had jurisdiction of the case unless the ordinance in that aspect would be the supreme law of the state; and that document provides, in article 1, Sec. 13, as does the fourteenth amendment to the Constitution of the United States, that:

'No person shall be deprived of life, liberty, or property without due process of law.'

Under this provision of the State Constitution the ordinance would be as invalid as under the

Federal Constitution. It would not be a state law. It would be with respect to the former, as the complainant charges in its complaint with respect to the latter, 'without authority in law, null, and void, and of no force and effect.' The presumption is that the courts of Washington will not deny to any of its citizens or corporations the equal protection of its Constitution. If, however, it should turn out that we are mistaken in this respect, the complainant will have his remedy in an appeal from the highest court of the state to the Supreme Court of the United States.

> 'The doctrine here is that the aggrieved party must first invoke the aid of the state courts, since it is for the state courts to remedy the acts of state officers done without authority of, or contrary to, state law. In such a case the complaining party must exhaust his remedy in the state courts by prosecuting his case to the state court of last resort for cases of that character; and, until he has done this, it cannot be said that he has been denied due process or deprived of his property by state action. If the decision of the highest state court to which he can resort is adverse to him, he can then take his case on writ of error to the United States Supreme Court upon the ground, not that the proceeding or action complained of was contrary to or unauthorized by state law, but upon the ground that what was complained of as a deprivation of life, liberty, or property without due process of law in violation of the fourteenth amendment has at last received the sanction of the state and, in effect, become the act of the state itself.' 5 Ency. U. S. Sup. Ct. Rep. p. 545.

This was substantially the question before the Supreme Court of the United States in Hamilton Gaslight Co. v. Hamilton City, supra, where the court said:

> 'The jurisdiction of that court (Circuit Court of the United States) can be sustained only upon the theory that the suit is one arising under the Constitution of the United States. But the suit would not be of that character, if regarded as one in which the plaintiff sought protection against the violation of the alleged contract by an ordinance to which the state has not, in any form, given or attempted to give the force of law. A municipal ordinance, not passed under supposed legislative authority, cannot be regarded as a law of the state within the meaning of the constitutional prohibition against state laws impairing the obligations of contracts.'
>
> See, also, Barney v. City of New York, 193 U. S. 430, 24 Sup. Ct. 502, 48 L. Ed. 737.''

It is respectfully submitted that the decree appealed from should be affirmed.

Dated, San Francisco,
March 28, 1934.

JOSEPH E. BIEN,
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Attorneys for said Appellees.